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IN THE

Supreme Court of the United States

October Term, 1966
No. 756

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Appellants,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Appellee.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

October Term, 1966
No. .....

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Appellants,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Appellee.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final Order of the District Court of Appeal of the State of California, Second Appellate District, of May 5, 1966, denying Appellants' Petition for an Extraordinary Writ, *i.e.*, a Writ of Certiorari, to review the act of the Superior Court of the State of California for the County of Los Angeles in granting Orders for Possession of Appellants' land to the State of California before service of Summons and Complaint upon Appellants, with neither notice to Appellants nor hearing thereon, and in refusing to vacate such Orders upon motion of Appellants. In the alternative, Appellants' Petition to the District Court of Appeal prayed for a Writ of Mandate commanding the Superior Court of the State of California for the County of Los Angeles to vacate the Orders for Possession or, in the alternative, for such other Extraordinary Writ

as the District Court of Appeal deemed appropriate under the circumstances.

Appellants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of appeal herein, and that a substantial question is presented.

Opinions Below.

The District Court of Appeal for the State of California, Second Appellate District, denied Appellants' Petition for an Extraordinary Writ without a hearing and without opinion [R. 104-105].[1] The Supreme Court of the State of California denied Appellants' Petition for Hearing without opinion [R. 155-156].

Grounds of Jurisdiction.

(i) This is an appeal from the final order of the District Court of Appeal of the State of California, Second Appellate District, denying Appellants' petition for an extraordinary writ seeking to review the order of the Superior Court of the State of California for the County of Los Angeles denying Appellants' motion to vacate order for possession, or in the alternative for a Writ of Mandate directing the Superior Court to vacate the order for possession. See *Bandini Petroleum Co. v. Superior Court,* 284 U.S. 8 at page 14.

(ii) The order of the District Court of Appeal of the State of California, Second Appellate District, sought to be reviewed, was entered on May 5, 1966. The notice of appeal to the Supreme Court of the United States

[1]The letter R. followed by numbers, designates pages of the certified record filed herein.

was filed in the Superior Court of the State of California for the County of Los Angeles (the court possessed of the record) on August 1, 1966. Thereafter, pursuant to Rule 13(1) Revised Rules of the Supreme Court of the United States, the time for docketing the case in the United States Supreme Court was enlarged to November 7, 1966, by a judge of the court in which the notice of appeal was filed.

(iii) The jurisdiction of the United States Supreme Court rests on Title 28, United States Code, §1257(2).

(iv) Cases believed to sustain the jurisdiction of the United States Supreme Court are: *Griffin v. Griffin,* 327 U.S. 220; *Mullane v. Central Hanover Bank,* 339 U.S. 306; *City of New York v. New York N.H. and H.R. Co.,* 344 U.S. 293; *Covey v. Sommers,* 351 U.S. 141; *Walker v. Hutchinson City,* 352 U.S. 112; *Schroeder v. City of New York,* 371 U.S. 208; *Wisconsin Electric Power Company v. Milwaukee,* 352 U.S. 948; *Wuchter v. Pizzuti,* 276 U.S. 13; *Armstrong v. Manzo,* 380 U.S. 545; *Pennoyer v. Neff* (U.S.) 5 Otto. 714.

Statute Involved.

Part III, Title VII, §1243.5 of the California Code of Civil Procedure is set forth in Appendix A hereto.

Questions Presented.

The following question is presented by this Appeal:

Is Part III, Title VII, §1243.5 of the California Code of Civil Procedure unconstitutional on its face and as applied in this case, in that it provides that in a condemnation proceeding and before service of summons or other process on local resident land owners,

the trial court must upon condemnor's request issue an *ex parte* Order for Possession purporting to confer upon the condemnor the right to take possession of Defendants' land 20 days after service of such Order (the time of service being entirely at the condemnor's pleasure), thereby taking Appellants' real property — their possessory interest in their land — without service of summons or other process, or any other compliance with the minimal standards of due process of law — notice and hearing?

Statement of the Case.

This appeal arises from an action in eminent domain, in which the State of California seeks to take certain land from the Appellants herein for purposes of freeway construction, and other activities associated therewith.

Appellants are the owners of a parcel of land located in Los Angeles County. They are local residents whose address is and at all times was known to the State of California. The State of California brought an action in the Los Angeles County Superior Court (*People of the State of California acting by and through the Department of Public Works v. Glouner, et al.*, Los Angeles Superior Court Case No. 879171), seeking to take certain parcels of Appellants' land for a freeway construction, for drainage easements, for utility easements to be turned over to private utility companies, and for a temporary construction easement [R. 1-19].

Pursuant to provisions of Part III, Title VII, §1243.5 of the California Code of Civil Procedure, the State, without notice to Appellants and before service of Summons, Complaint or any other process or papers

upon Appellants, secured from the Superior Court of Los Angeles County *ex parte* orders purporting to authorize the State to take possession of the Appellants' land, 20 days after service of such Order on Appellants[2] [R. 24, 26]. Appellants were served with Summons, Complaint and Order for Possession at the same time.

Promptly after being served with such Order, Appellants moved the Superior Court for the State of California, County of Los Angeles, that such Order be vacated [R. 30]. Said motion was expressly based upon a contention of denial of due process of law [R. 30] within the meaning of the Fifth and Fourteenth Amendments of the U.S. Constitution [R. 34-36, 40-41]. The Superior Court denied such motion [R. 44].

Inasmuch as Orders for Possession issued before trial are not appealable in California (*San Francisco Unified School Dist. v. Hong Mow* [1954], 123 Cal. App. 2d 673, 672, 267 P. 2d 27). Appellants, pursuant to the provisions of Part III, Title I, California Code of Civil Procedure, petitioned the District Court of Appeal of the State of California, Second Appellate District, for a Writ of Certiorari, or in the alternative, for a Writ of Mandate, or in the alternative, for such other extraordinary writ as that court deemed appropriate under the circumstances [R. 48], to review the acts of the Superior Court for the County of Los Angeles in issuing such *ex parte* order for possession, or commanding said Superior Court to vacate its order

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[2]The *ex parte* procedure was followed in spite of an admitted lack of urgency: one of the Orders for Possession had an effective date of August 1, 1966, although it was secured on March 11, 1966 [R. 25].

of possession.[3] Appellants' petition for an extraordinary writ was denied without a hearing and without opinion [R. 104-105]. Appellants made no Petition for Rehearing to the District Court of Appeal, as such petition is not permitted after denial of a petition for an extraordinary writ without issuance of an alternative writ or order to show cause (Rule 27[a], California Rules of Court).

Thereupon, Appellants petitioned the Supreme Court of the State of California for a hearing [R. 106]. Such Petition for Hearing was denied without opinion [R. 155-156].

Thereupon, Appellants filed their Notice of Appeal to the United States Supreme Court [R. 157].

In the Superior Court for Los Angeles County [R. 30, 34-35, 40-41], in their petitions to the District Court of Appeal [R. 51-52, 68-71, 77-78] and to the Supreme Court of the State of California [R. 115, 118, 123-125, 126-128], Appellants throughout expressly raised the federal constitutional question, namely, whether the procedure and manner in which Appellants were deprived of their possessory right in their own land without service of process, notice, or hearing was repugnant to the due process requirements, within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.

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[3]In response to such Petition for an Extraordinary Writ there was no appearance by the respondent Superior Court. The Petition was opposed by the real party in interest, the State of California [R. 91], as provided in Part III, Title I, Chapter 4, §1107 California Code of Civil Procedure. There was likewise no appearance by the Respondent Superior Court in the Supreme Court of the State of California.

The Federal Question Raised Is Substantial.

As the construction of interstate highways goes on, aided by federal funds under the Federal Highway Act of 1956, the power of eminent domain strikes increasing numbers of citizens.[4] While the initial links of the interstate highway network were laid out largely across the sparsely populated countryside, currently highways and freeways, with ever-increasing frequency, slash across densely populated areas (see 12 U.C.L.A. Law Review 809). Such impact of highways upon densely populated areas is not confined to the California freeways, but is felt throughout the country (see *e.g.*, Skow, "The 'Highwaymen' Come to Morristown," *Saturday Evening Post*, April 9, 1966, p. 68).

Thus, the instant case brings before this Court, not an isolated incident from Southern California, but a distressing problem which is re-enacted daily throughout the country in literally thousands of cases. This problem gives rise to the issue of what are the due process requirements when a citizen, in a state eminent domain court action, is deprived of possession of his own land before trial.[5] Does due process mandate notice and hearing before the owner's right to possession of his own land is expropriated? Does due process require, at the very minimum, that the owner be served with process, before a court can issue an order depriving him of the possessory interest in his own land?

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[4]Such highways are, of course, only one kind of public works giving rise to the problems involved in this appeal.

[5]Please note that the right to take possession of land prior to trial is not challenged by Appellants. The question raised herein is—what are the *procedural due process* requirements imposed by the United States Constitution on states, when possession of land is so taken.

Appellants respectfully contend that the above two questions should be answered in the affirmative.

This appeal is brought before this Honorable Court upon two lines of cases. First, where, in a judicial proceeding, a court purports to make orders substantially affecting a person's rights, *before any* service upon such person of the court's process, any orders, determinations, and judgments made by such court under the above circumstances are void for failure to comply with the minimum standards of due process. *Pennoyer v. Neff* (U.S.) 5 Otto 714, *Roller v. Holly,* 176 U.S. 398, *Wuchter v. Pizzuti,* 276 U.S. 13, and *Armstrong v. Manzo,* 380 U.S. 545.

The second contention of Appellants is that entirely aside of the question of denial of due process by reason of action by a court lacking jurisdiction over the defendant, substantial rights of a person may not be impaired without notice and a meaningful opportunity to be heard. This point is exemplified by this Court's decisions in *Griffin v. Griffin,* 327 U.S. 220, *Mullane v. Central Hanover Bank,* 339 U.S. 306, *New York v. New York, N.H. & H.R. Co.,* 334 U.S. 239, *Covey v. Sommers,* 351 U.S. 141, and *Armstrong v. Manzo,* 380 U.S. 545.

Specifically, the right to notice and hearing before one's rights are impaired is as applicable to eminent domain proceedings as in any other state action. *Walker v. City of Hutchinson,* 352 U.S. 112, *Wisconsin Electric Power Company v. Milwaukee,* 352 U.S. 948, *Schroeder v. City of New York,* 371 U.S. 208. In the words of this Court:

> "Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a state's power to regulate fishing in its waters (citations), its power to regulate intrastate trucking rates (citations), a city's power to issue certain bonds without a referendum (citation), its power to license motor vehicles (citation), and a host of other governmental activities carried on by the states and their subdivisions . . ." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 at 192.

The State's exercise of eminent domain is but one kind of state action which, in all its manifestations, is fully subject to the constitutional limitation of due process of law imposed on the states by the Fourteenth Amendment (*Southern R. Co. v. Virginia*, 290 U.S. 190; *Mooney v. Holohan*, 294 U.S. 103, *N.A.A.C.P. v. Alabama*, 357 U.S. 449).

The power to take possession of land being condemned prior to trial is peculiarly susceptible to abuses by a condemnor. Even under Federal statutes, where the trial court has full power to permit possession only upon such terms and at such time as it deems just (see 40 U.S.C. §258a), the power of immediate possession can be used by condemnors as a club over the head of the property owner (see *United States v. 6,576.27 Acres, etc.*, 77 Fed. Supp. 244, 247). Moreover, under Federal law, even where the government claims urgent and compelling reasons for early possession, the property owner is entitled to notice, hearing, and appellate review of the circumstances of such taking of possession (See *United States v. Certain Land in Borough of Manhattan*, 332 F. 2d 679, 682).

But, in California, under the statute challenged herein, no such safeguards exist. California courts acting under the challenged statute, lack the power to prescribe conditions precedent to the taking of immediate possession by the State, or create *any* requirements safeguarding the property owners' rights.

California Code of Civil Procedure §1243.5 in mandatory language (". . . the court shall . . .") requires the court to grant possession at such time as requested by the condemnor, subject only to the requirement that the Order of Possession be served 20 days before possession.

The only discretion which Code of Civil Procedure §1243.5 purports to grant to California trial courts is as to the amount of money to be deposited as security prior to the taking. But it is manifest, that even that power is illusory as far as any real protection to the property owner is concerned. When the application for an Order for Possession is made to a California court *ex parte,* before the property owner is even served with process, the trial court has no facts before it except those which the condemnor chooses to place before the court. There is no semblance of adversary proceeding, the adverse party is not even within the jurisdiction of the court. It is respectfully submitted that even the best-intentioned court under such circumstances is reduced to the status of the condemnor's "rubber stamp". The court under these circumstances cannot know the facts, nor the equities, nor the values involved, nor any undue hardships which the immediate possession may impose on the property owner. And if it did know them, it—unlike a Federal Court under 40 U.S.C. §258a—could do nothing about them. Each

case has its own problems for the owner, which a court proceeding *ex parte* is necessarily ignorant of. Under California law trial courts lack the power to delay possession, or impose any conditions upon the condemnor, and the taking of possession is not subject to appellate review.

In conclusion, Appellants respectfully submit that, manifestly, under the California procedure described above, substantial Federal rights of citizens to notice and hearing, the *sine qua non* of due process of law, and their right, likewise protected by due process of law, to be brought within the jurisdiction of a court which purports to expropriate their rights, are being disregarded. Such procedure opens the door wide to grave abuses. Abuses, it has been held, are not to be tolerated, whether present or potential (*Southern R. Co. v. Virginia, supra,* 290 U.S. at 195, *United States v. 6,576.27 Acres, etc., supra,* 77 Fed. Supp. at 247, *Hornsby v. Allen,* 326 F. 2d 605 at 610).

The procedure outlined by the statute challenged herein deprives courts of their traditional role as guardians of the constitutional rights of litigants, reduces the courts to servants of condemnors, and makes a citizen's rights in the courts a matter of governmental grace or discretion. Such state of affairs is repugnant to the concept of the due process of law. *Roller v. Holly,* 177 U.S. 398 at 409; *Coe v. Armor Fertilizer Works,* 237 U.S. 413 at 424-425; *Security Trust v. Lexington,* 203 U.S. 323 at 333; *Louisville and Nashville R. Co. v. Central Stockyards Co.,* 212 U.S. 132 at 144.

To permit such procedure to go unchecked will undoubtedly insure continuing abuses on the part of state condemning agencies. It is therefore respectfully sub-

mitted that the federal question presented here is indeed substantial.

Moreover, in view of California's peculiar procedure which denies the right to appeal an Order for Possession issued before trial, relief by this Honorable Court is urgently needed, as a matter of plain justice as well as constitutional principle.

In the end, no state agency can possibly be prejudiced or its effective functioning impaired by the requirement that it afford to the citizens the safeguards inherent in due process of law ". . . a profound attitude of fairness between man and man, and more particularly between an individual and government . . .". The honor and effectiveness of the sovereign, whether state or nation, can only be enhanced and not diminished by granting to its citizens a full measure of the protection guaranteed by the U.S. Constitution.

Appellants respectfully urge that this Honorable Court hear this appeal and thereupon reverse the order of the District Court of Appeal of the State of California appealed from, and declare Part III, Title VII, §1243.5 of the California Code of Civil Procedure to be repugnant to the United States Constitution.

Respectfully submitted,

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JERROLD A. FADEM,
GIDEON KANNER,
Counsel for Appellants.

APPENDIX A.

Part III, Title VII, § 1243.5, California Code of Civil Procedure.

(a) *Security for payment of compensation; amount; deposit; application for court order.* In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(b) *Authority to take immediate possession of and to use property; contents of court order.* If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the security, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.

(c) *Personal service or mailing of court order; record owners or owners of the property defined.* At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered

or certified mail in lieu of personal service. the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) *Increase or decrease in security.* At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage incident thereto is different from the amount of the

security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

(e) *Security as evidence in trial of issue of compensation.* The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(f) *Right of appeal.* The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

APPENDIX B.

Exhibit 1.

Order of Superior Court of the State of California for the County of Los Angeles, Denying Motion to Vacate Order for Possession [R. 44].

Superior Court of the State of California for the County of Los Angeles. Dept. 64.

Date: April 26, 1966.

Honorable James D. Tante, Judge. Deputy Sheriff, O. Ortiz, Deputy Clerk. James J. Marquardt, Reporter. (Parties and counsel checked if present)

9:00 am. 879771.

Counsel for Plaintiff. Pegram & Montoya by: Robert W. Vidor.

Counsel for Defendant. Fadem, Brown & Kanner for defts. Glouner by: Gideon Kanner.

The People of the State of California, etc. vs. Donald C. Glouner, et al.

(Parcels 1A, 1B, 1C, 1D, 1E, 1F & 1G).

Nature of Proceedings: Eminent Domain.

Motion of defendants, Glouner, to vacate the Order for Possession.

Matter comes on for hearing.

Following argument, defendants' motion to vacate the Order for Possession is denied. Notice waived.

Exhibit 2.

Order of District Court of Appeal of the State of California, Second Appellate District, Denying Petition for Extraordinary Writ. [R. 104-105]. (This Is the Order Appealed From.)

MINUTES OF DIVISION FOUR

Civil No. 30572. May 5, 1966.

Glouner vs. Superior Court L.A. Co.

The Court: Petition for writ of Certiorari or mandate denied.

Exhibit 3.

Order of the Supreme Court of the State of California, Denying Petition for Hearing.

Order Denying Hearing After Judgment by District Court of Appeal. 2nd District, Division 4, Civ. No. 30572. Order Due, June 3, 1966.

In the Supreme Court of the State of California in Bank.

Glouner, et al. v. Superior Court of Los Angeles County.

Filed, June 1, 1966.

Petition for hearing Denied.

Traynor
Chief Justice.

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Appellants,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Appellee,

and

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,
Real Party in Adverse Interest.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF.

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Real Party in Adverse Interest.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF.

The People of the State of California, acting by and through the Department of Public Works, hereinafter called the "State," plaintiff and real party in adverse interest in the State court proceeding,[1] hereby move this

[1]Although appellants failed to include the State as appellee, it is the true answering party in this cause. The Orders for Possession were obtained upon application by the State and ran in favor of the State. In the Petition for Extraordinary Writ thereafter filed by appellants, the State was required under California procedure to be named and served as real party in interest and was entitled to and did serve and file points and authorities in opposition. Rule 56(a)(b) *California Rules of Court.* In Cali-

(This footnote is continued on the next page)

Honorable Court to dismiss the appeal herein. Pursuant to Rule 16(b) Revised Rules of the Supreme Court of the United States, the motion is made on the grounds that no substantial federal question is presented by appellants and that the Order of the District Court of Appeal for the State of California rests on an adequate non-federal basis.

Supplemental Statement of Proceedings Below.

The *ex parte* Orders for Possession herein were signed and filed on March 11, 1966. Said Orders provided that the State was authorized to take possession of the subject parcels of appellants' property on the dates set forth therein "or on the twenty-first day following the date of service of this order, whichever is later" [R. 25, 27].

Appellants were personally served with Summons and Complaint and the Orders for Possession on March 16, 1966, more than twenty days prior to the dates for possession set forth in said Orders [R. 32].

Prior to the effective date of the Orders for Possession and before moving to vacate said Orders, appellants appeared in the action by Answer [R. 28-29].

Appellants' motion to vacate was based solely on grounds of lack of jurisdiction and lack of due process [R. 30-31], and was denied by the Superior Court after briefing and argument by both sides [R. 44].

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fornia a petition that a Writ of Certiorari issue, such as appellants prayed for, *inter alia* [R. 56], is an additional method of reviewing the judicial act of a lower court. The lower court, as here the Superior Court of the County of Los Angeles, has no greater interest in the matter than when an appeal is taken from a judgment or order thereof. See *Matter of DeLucca*, 146 Cal. 110, 79 Pac. 853; *Lee v. Small Claims Court*, 34 Cal. App. 21, 92 P. 2d 937.

Section 1243.5 of the California Code of Civil Procedure Provides for Notice Before a Landowner Must Give Up Possession and Appellants Received Actual Notice by Personal Service and Had an Opportunity to Be Heard.

A reading of Section 1243.5 Code of Civil Procedure shows that it provides for obtaining possession before judgment in two phases. The first phase is *ex parte:* that is, the fixing and deposit of security and the entry of the Order for Possession by the Court. At this phase a landowner's rights are no more disturbed than the issuance of summons or filing of a *lis pendens* in an eminent domain proceeding. At this phase the condemnor has *prima facie* established its right to immediate possession and that it has deposited an amount reasonably adequate to secure payment of just compensation.

The second phase, as set forth in subdivision (c) and (d) of Section 1243.5 California Code of Civil Procedure, provides for both actual notice and an opportunity to be heard with respect to the security deposit. Thus, at least twenty days before an owner or occupant must vacate he receives, as did appellants herein, actual notice of the Order by personal service or notice by mail if he has previously appeared. Within said twenty days a landowner could move to protect his rights if the condemnor lacks authority to obtain immediate possession or if there is any defect or irregularity in obtaining the Order. At any time after the Order is made, the landowner may move to increase the security deposit.

The State submits that the foregoing satisfies the minimum standards of procedural due process enun-

ciated by this Honorable Court in *Mullane v. Central Hanover Trust,* 339 U.S. 306 at 314-315, as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (Citations omitted). But if with due regard for the particularities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

The cases cited by appellants on page 3 of their Jurisdictional Statement are not applicable to sustain jurisdiction herein. Said cases all involved the sufficiency of some form of substituted service resulting in a judgment or decree which operated to cut off a party's rights before he had actual notice of the pending suit.

Thus: *Griffin v. Griffin,* 327 U.S. 220 (validity of judgment and execution for accrued alimony under prior divorce decree: no actual notice to judgment debtor); *Mullane v. Central Hanover Trust,* 339 U.S. 306 (validity of decree settling accounts of a common trust fund: no actual notice to unknown, non-resident beneficiaries); *City of New York v. N.Y., New Haven and Hartford R.R. Co.,* 344 U.S. 293 (validity of order barring lien-claims in reorganization proceeding: no actual notice to known creditor); *Covey v. Town of Somers,* 351 U.S. 141 (validity of tax-lien foreclosure: actual notice received by mail but taxpayer an incompetent without guardian); *Walker v. Hutchinson City,* 352 U.S. 112 (validity of hearing to assess

compensation: no actual notice to known local resident); *Schroeder v. City of N.Y.*, 371 U.S. 208 (validity of service upon riparian landowners by newspaper publication and by posting notices on trees and poles along the river: no actual notice to landowner); *Wuchter v. Pizutti*, 276 U.S. 13 (validity of service of process on Secretary of State in personal injury action against non-resident motorist: no actual notice to defendant); *Armstrong v. Manzo*, 380 U.S. 545 (validity of adoption decree: no actual notice to natural father during adoption proceedings).

In the case at bar appellants received actual notice under subdivision (c) of the statute which requires personal service of the Orders for Possession at least twenty days before appellants had to relinquish possession. Unlike the situation in *Walker* and *Schroeder, supra,* no justiciable rights of appellants were foreclosed on making of the Orders *ex parte.*

The Procedure for Taking Possession Under Section 1243.5 California Code of Civil Procedure Is Less Summary Than the Federal Procedure for Taking Title (40 U.S.C. Sec. 258a), and the Latter Has Been Upheld Against Due Process Objections.

The "Declaration of Taking Act"—40 United States Code, Section 258a provides in substance that in a condemnation proceeding the United States may, at the time of filing its petition or anytime before judgment, file a Declaration of Taking of the subject property. Said declaration must contain certain prescribed statements and a description of the property. If at the time it is filed the Government deposits the estimated compensation with the court, title in fee simple absolute

will vest in the United States. At the same time, the right to immediately receive the estimated award vests in the landowner.

The "Declaration of Taking" or vesting of title does not depend on notice or service to the landowner; nevertheless, the procedure is not an unconstitutional deprivation of property, since it provides for payment of just compensation.

City of Oakland v. U.S., 124 F. 2d 959, 963;
Hessel v. A. Smith & Co., 15 Fed. Supp. 953, 957.

In a federal eminent domain action due process requires no more than that the owner be given an opportunity to be heard at some stage of the proceeding upon reasonable notice of the pending action.

No. Laramie Land Co. v. Hoffman, 268 U.S. 276;
Dohany v. Rogers, 281 U.S. 362, 369.

In other words, a taking of title or the right to possession in advance of notice or hearing thereon does not violate procedural due process if the owner's right to just compensation is secured and if he is given notice and an opportunity at some stage of the proceeding to present justiciable issues before he is finally divested of either title or possession.

Under California Decisional Law an Order for Possession Before Judgment Is Not Effective Until Served and Is Subject to Judicial Review of the Right to Take Possession.

The ruling of the California Superior Court denying appellants' motion to vacate the Orders for Possession also rests on an adequate non-federal basis: *i.e.,* that said Orders were conditional and did not affect appellants' right of continued occupancy until service thereof. The "effective date" of Orders for Possession obtained under Section 1243.5 Code of Civil Procedure has been decided in two California appellate decisions, *People v. Podrat,* 194 Cal. App. 2d 696, 15 Cal. Rptr. 343, and *People v. Salem Development Corp.,* 216 Cal. App. 2d 652, 31 Cal. Rptr. 193, which held that the Orders for Possession obtained *ex parte* were subject to the condition subsequent of service upon the landowner or occupants. Thus, the basic premise of appellants—that the Orders when made *ipso facto* divested appellants of possession—is at variance with California decisional law. The Orders when made gave the State the right to immediate possession, and when served required appellants to relinquish possession within the stated period. They did not operate to disturb appellants' rights until served.

Appellants' statement that "the taking of possession is not subject to appellate review" in California is incorrect (J.S. p. 11). If it appears that the public use of the property is not one for which immediate possession is authorized the Court, on motion, will annul

the order. *O. T. Johnson v. Superior Court,* 103 Cal. App. 2d 278, 229 P. 2d 849. If the condemnor is not entitled to immediate possession the order will be vacated, *Sierra Madre v. Superior Court,* 191 Cal. App. 2d 587, 12 Cal. Rptr. 836); or if the property is immune from condemnation the order will be annulled and further proceedings enjoined. *Eden Memorial Park v. Superior Court,* 189 Cal. App. 2d 421, 11 Cal. Rptr. 189.

After actual notice of the Orders appellants had an opportunity to be heard on the two matters to which they were entitled to a hearing: whether the State was entitled to immediate possession and whether the security deposited was adequate. Neither was raised by appellants in their motion to vacate the Orders. The other "facts," "equities" or "undue hardships" which appellants seek to raise are not within the scope of procedural due process. When the right of eminent domain is invoked, the plans of individual landowners must, within constitutional limitations, give way to those of the People. Furthermore, the problems of which appellants speak are moot since no contention was made below and none is asserted here, that the Orders were obtained in bad faith or that immediate possession worked a hardship on appellants.

The utter lack of merit of the instant appeal is an example of how State highway improvements could be needlessly delayed—at additional expense to the taxpayers and users thereof—if, in every case, a noticed

motion for possession were necessary. The burden on the courts as well as condemnors would be inestimable. Appellants' rights to notice and an opportunity to be heard are fully protected under both the statute and California decisional law and the State respectfully urges that this appeal be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966
No. 756

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Appellants,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Appellee,

and

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Real Party in Adverse Interest.

BRIEF OPPOSING MOTION TO DISMISS.

Introduction.

The Real Party in Interest, hereafter called the State, bases its Motion to Dismiss on the grounds that no substantial federal question has been presented and that the decision below rests on adequate state grounds. As to the former, the lack of merit of the State's assertion is illustrated by the fact that the State has presented no argument as to the substantiality and importance of the question. In fact, as demonstrated *infra*, the question is of far-reaching importance and

has been the subject of litigation in many states, with conflicting results.

As to the supposedly adequate state grounds for the decision below, the assertion is unfounded in the record and contradicted by the State's own position taken in the courts below.

The State's attempt to raise the specter of delay in public works construction has all the earmarks of the proverbial "straw man". States other than California require notice and hearing before dispossession with no ill effects on their construction programs. Moreover, Appellants have not and do not oppose the right of the State to take possession of land before trial. (See Jurisdictional Statement, p. 7, footnote 5.) Appellants' contention is that such taking of possession must be accompanied by the safeguards inherent in the concept of procedural due process of law. Appellants contend that the minimum which such safeguards require, includes jurisdiction, notice and hearing *before* a court can make an order substantially affecting Appellants' rights in their own land.

The State's suggestion that noticed motions for an Order of Possession would cause "inestimable burdens" and delays, even when viewed in a light favorable to the State, seeks to sacrifice the citizen's right to procedural due process on an altar of expediency.

However, in the factual context of the instant case the State's suggestion cannot possibly be made in good faith, for the following reason. The State secured an order for possession *ex parte* on March 11, 1966. [R. 25.] As drafted by the State, the order allowed possession not earlier than August 1, 1966. [R. 25.] Thus, the State drew and obtained its order so as to provide

3½ months' lead time. In California a motion can be heard on only 10 days' notice, and even that time can be shortened by a court. (Part II, Title XIV, Chap. 1, §1005, California Code of Civil Procedure.) Thus, in the context of the case at bench, this Court is being asked by the State to believe that 10 days is a more burdensome delay than 3½ months.

To allow the State to secure dispossession orders *ex parte* is to sanction abuses. An order for possession obtained without the affected property owner's knowledge can and has in the hands of overzealous or unscrupulous right-of-way agents become a negotiating weapon used with devastating effect on individual condemnees. The State armed with its *ex parte* order can say to the condemnee—"Play ball with us and we will delay serving the Order for Possession. But if you don't, we will have you out of here in 20 days."

The individual confronted with such a power play cannot even seek protection of California courts, as the California statute denies to courts any discretion as to time of possession, except to *reduce* such time at the condemnor's request.

The Federal Question Presented Is of Far-Reaching Importance.

The current extensive program of highway construction, coupled with an explosive growth of state and local governments, has brought about a great increase in the frequency with which eminent domain is used to secure land for burgeoning public works programs. Additionally, the country is increasingly becoming urbanized, with the result that urban-surburban population

centers, the areas in which more public facilities are needed, are also the areas where population density is highest. The inevitable consequence is that the exercise of eminent domain strikes greater numbers of persons with increasing frequency.

The result has been a groundswell of eminent domain litigation, unprecedented in history. For example, during the past fiscal year, 4226 eminent domain cases were filed in the Los Angeles County Superior Court. (Judicial Council of California, *Annual Report of the Administrative Office of the California Courts,* Fiscal Year 1965-1966—this Report is now in the process of publication.) Each eminent domain case is filed against many parcels of land and many owners. Appellants' counsel frequently defend eminent domain cases with as many as 30 or 50 defendants. Thus, tens of thousands of persons annually feel the impact of eminent domain in Los Angeles County alone. A great majority of such cases are takings for rights-of-way, and involve orders of immediate possession.

One consequence of this floodtide of eminent domain litigation has been a controversy over the manner in which a condemnor may take possession of land before trial on the issue of just compensation. Thus, statutes such as the one challenged herein, purporting to allow the taking of possession by means of *ex parte* court orders have increasingly been drawn into litigation.

Such statutes have been repeatedly struck down for their denial of procedural due process to the property owners. *State ex rel. Eastvold v. Yelle* (1955), 46 Wash. 2d 166, 279 P. 2d 645; *Yellowstone Pipeline Co. v. Drummond* (1955), 77 Idaho 36, 287 P. 2d

288; *State v. Phares* (1963), 245 La. 534, 159 So. 2d 144.

In other states, the immediate possession statutes have been upheld, but such statutes require noticed adversary hearings *before* the order for possession can be issued. *Department of Public Works v. Butler Co.* (1958), 13 Ill. 2d 537; 150 N.E. 2d 124, (see [S.H.A.] Illinois Annotated Statutes, Chap. 47, §2.2); *Desert Waters Inc. v. Superior Court* (1962), 91 Ariz. 163, 370 P. 2d 652; (see Arizona Revised Statutes, Title 12, Chap. 8, §12-1116, subdiv. B).

The entire area of initial condemnor-condemnee confrontation is one susceptible to abuses. *United States v. 6,576.27 Acres etc.*, 77 Fed. Supp. 244, 247. It is a time in which the property owner, often not certain of his property's worth, looks to his government for a fair price, but instead finds himself a defendant in a lawsuit. Not surprisingly, there have been so many abuses in this area that the Federal Government, felt it had to step in, and has issued regulations[1] which order the states to make their best offers to prospective condemnees in writing, and to deposit at least 75% of the estimated award[2] before taking possession, on pain of withholding federal-aid highway funds to offending states. Of course, such regulations, commendable though they are insofar as they go, do nothing to insure *judicial* procedural due process to individual prop-

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[1]U.S. Department of Commerce, Bureau of Public Roads, Instructional Memorandum 21-9-65, dated September 13, 1965, and instructional Memorandum 21-14-65, dated November 30, 1965.

[2]Please note that a 75% deposit has been held to be constitutionally inadequate. *Pittsburgh R. Co. v. Port of Allegheny County Authority* (1964), 415 Pa. 177 [202 A. 2d 816].

erty owners, such as Appellants herein. To secure their right to due process in judicial proceedings, Appellants must turn to this Court, since California courts have denied them relief.

Lack of Jurisdiction, Notice and Hearing at the Time of Issuance of a Court Order Cannot Be Cured by Giving Notice That the Order Is About to Be Executed.

The State advances a curious theory that an Order for Immediate Possession operates in two "phases"—first, it is obtained, and then executed. And it is only in the execution phase—argues the State—that jurisdiction need exist and notice need be given.

The State's suggestion is untenable for the reason that not only orders for immediate possession, but all orders and judgments of a court operate in such "two phase" manner.

A judgment, like an order, must be first obtained; only then can it be executed. Thus, if there were any validity to the State's theory, one could go into a court, file a lawsuit, obtain an *ex parte* judgment without service, notice or hearing, and then give notice to the hapless defendant that a judgment against him has been obtained and will be executed in so many days. Thereupon, it would be incumbent upon the defendant to assert his rights by moving the court to vacate the judgment. Such a procedure, is manifestly repugnant to the concept of procedural due process.

It should be noted, however, that while the State's suggestion plainly lacks merit, it is not new—it has been struck down by this Court before. The Court's most recent rejection of an identical legal argument in a

different factual context occurred only last year in *Armstrong v. Manzo,* 380 U.S. 545. In the light of this Court's clear and unequivocal language in *Armstrong* (380 U.S. at 550-551), Appellants respectfully submit that the State's "second phase notice" theory is misconceived.

Likewise, the State's assertion (State's Br. p. 8) that there was no argument below as to substantive merits and therefore "the problems of which appellants speak are moot," is both a *non sequitur* and erroneous. In *Coe v. Armour Fertilizer Works,* 237 U.S. 413, this Court in rejecting a similar argument held at page 424:

> "But, it is said, plaintiff in error . . . in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions as to which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he had not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Likewise *Griffin v. Griffin,* 327 U.S. 220 at 230-231, and *Armstrong v. Manzo,* 380 U.S. 545 at 551.

The point was concisely stated in *United States v. Claudy* (1953, C.A. 3d), 204 F. 2d 624, at 627:

> "Even in civil cases where a personal judgment has been entered without according the defendant rea-

sonable notice and opportunity to be heard, the State may not dilute the requirements of due process by requiring the defendant hereafter to show as a condition precedent to the vacating of the judgment that he has a substantial defense. [Citing *Coe* and *Griffin*]. Thus, regardless of the merits, the establishment of the essential issues in a civil or criminal case must be after reasonable notice and an opportunity to be heard if the procedure is to meet the standard of due process."

To sum up, at the time the Order for Immediate Possession herein was issued, the Appellee court lacked jurisdiction over Appellants—*this is admitted.* [See R. 94.] Moreover, pursuant to the terms of the statute challenged herein as unconstitutional (Part III, Title VII, §1243.5, California Code of Civil Procedure), there was no notice to Appellants, either actual or constructive. There was not even an attempt made to serve Appellants, either personally or by substituted service, with either Summons and Complaint or notice of the State's application of an Order for Possession. There was no service of any kind until *after* the State had its *ex parte* order to waive in Appellants' face. None of the essentials of due process of law were observed, although admittedly Appellants are local residents whose address was known by the State, and whom the State contacted before commencing its action. [See R. 150, lines 8-12.]

In the end, the State's argument boils down to the following. The State says it can go into a court unbeknownst to a property owner, file a lawsuit against him, and then without any service of process or other notice, secure *ex parte* a court order allowing the State

to permanently dispossess a land owner without further adjudication. The State argues it can then confront the property owner, hand him a copy of the Order for Possession and say: "Be off your land in *three* days."[3] This—says the State—is compliance with the constitutional mandate of procedural due process.

Appellants respectfully ask the Court—is it?

Contrary to the State's Assertions, There Is No Appeal in California From an Order of Immediate Possession — the State's Own Citations of Authority Confirm This.

The State asserts (State's Br. p. 7), that Appellants' earlier statements *re* lack of opportunity to appeal an Order of Immediate Possession are "incorrect". To support its assertion the State cites at page 8 of its Brief three opinions.

But what the State has failed to tell this Court is that *none* of the State's cases was an appeal. Each was an extraordinary writ proceeding which is not an appeal.[4] *O. T. Johnson v. Superior Court,* 103 Cal. App. 2d 278, 299 P. 2d 849 was a certiorari proceeding.

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[3]Subdivision (c) of the Statute challenged herein (Part III, Title VII, §1243.5, California Code of Civil Procedure) allows the State to shorten the 20-day period between the service of the Order for Immediate Possession and actual dispossession of the owner to only 3 days, again *ex parte,* and before the owner is served with *any* court process.

[4]In the footnote at p. 2 of the State's Brief, it is sought to be suggested with the aid of two vintage California cases that a respondent court in an extraordinary writ proceeding is as passive as a court whose decision is being appealed. In fact, not only can courts appear in such proceedings (*e.g., Morales v. Superior Court* [1966], 239 Cal. App. 2d 947), but on occasion they even litigate against one another (*Superior Court v. District Court of Appeal* [1966], 65 Cal. 2d ...., Advance Sheet citation; 65 A.C. 293 [419 P. 2d 183].)

Sierra Madre v. Superior Court, 191 Cal. App. 2d 587, and *Eden Memorial Park v. Superior Court,* 189 Cal. App. 2d 421 involved writs of prohibition.

An extraordinary writ proceeding in California is a *discretionary* exercise of a higher court's jurisdiction. Part III, Title 1, Sections 1068 and 1085, California Code of Civil Procedure. Indeed, such writs are also known as prerogative writs, and there is no way to compel a California court to issue one, or even to consider the petition for a writ on the merits.

Thus when a California Superior Court makes an *ex parte* order for immediate possession, the aggrieved property owner has no *right* to have it reviewed; he can only humbly petition a Court of Appeal for a writ which in the appellate court's discretion may or may not be considered on the merits.

Of course, seeking a hearing in the California Supreme Court to review the decision of a District Court of Appeal which has denied an extraordinary writ, is always addressed to the State Supreme Court's discretion. Article VI, Section 4c, California Constitution; Rule 28, California Rules of Court; *People v. Davis* (1905), 147 Cal. 346, 348, 81 Pac. 718. In short, *there is no right to appeal* an Order for Immediate Possession in California. *Central Contra Costa Sanitary District v. Superior Court,* 34 Cal. 2d 845, 848, 215 P. 2d 462; *San Francisco Unified School District v. Hong Mow,* 123 Cal. App. 2d 668, 672, 267 P. 2d 27.

Unlike Similar Federal Legislation, the Statute Challenged Herein Provides No Judicial Safeguards of Appellants' Rights.

The State makes no attempt to defend the fundamental fairness of the statute challenged herein and instead argues that the Federal Declaration of Taking Act. (Title 40, U.S.C., §258a) is even worse than the California statute. Therefore — argues the State — the California statute should be upheld.

The State's argument is both a *non sequitur* and a non-issue. The Federal Declaration of Taking Act is not before this Court.[5] California Code of Civil Procedure Section 1243.5 is.

In any event, whatever may be said about the Federal Declaration of Taking Act, there is no question that by its express language it firmly places control of the manner, circumstances, and time of transfer of possession within the sound discretion of a federal trial court. But the California statute challenged herein does not even purport to do that. Under the California statute the state trial court has no discretion to do anything but to fix the amount of deposit (without the owner being able to tell the court what in *his*

[5]In this connection it should be noted that this Court has apparently never approved the constitutionality of Title 40 U.S.C. §258a. One authority on which the State relies (See State's Br. p. 6) *Oakland v. United States,* 124 F. 2d 959, came from a U.S. Court of Appeals which rendered its opinion under the stringent emergency conditions existing during World War II, and expressly based its holding on such emergency (See 124 F. 2d at 964). The State's only other authority, *Hessel v. A. Smith & Co.,* 15 Fed. Supp. 953, a U.S. District Court opinion, expressly indicates that the property owner therein was afforded notice and hearing (15 Fed. Supp. at 955) and moreover the possession proceedings were expressly held open so as to permit the trial court to make further orders as necessary (15 Fed. Supp. at 954).

view is an adequate deposit), and to give the condemnor whatever the condemnor asks. Please contrast that with the federal procedure, in the light of *United States v. Certain Land in Borough of Manhattan,* 332 F. 2d 679.

Part III, Title VII, Section 1243.5, California Code of Civil Procedure requires neither service of process, nor notice, nor hearing before a state court issues its Order for Possession. It denies the condemnee an opportunity to be heard as to the amount of deposit until after the fact. Under such statute the state court lacks any discretion as to time or manner in which the transfer of possession is to take place. Moreover, the order is not subject to appeal. In all of the above ways Section 1243.5, California Code of Civil Procedure fails to meet the standards of fairness which *are* present in Title 40, United States Code, Section 258a—it is therefore not only *less* protective of an owner's rights than its federal counterpart, but in stark contrast displays its disregard of procedural due process.

There Are No Adequate State Grounds to Sustain the Decision Below — None Were Relied on by the State Courts.

Inasmuch as the State admits at the very outset of its brief (p. 2) that the Appellants' attack on the order for immediate possession in the lower courts was based *solely* on lack of jurisdiction and lack of due process [R. 30, 42], it is difficult to understand how the State can assert the presence of adequate state grounds. Surely, if the lower court lacked jurisdiction, then its acts, whether purportedly based on state law or not, were a nullity. It is basic that an act by a court lacking

jurisdiction, substantially affecting the rights of a person not before the court, is a denial of due process of law. *Pennoyer v. Neff* (U.S.), 5 Otto 714; *Wuchter v. Pizutti,* 276 U.S. 14 at 21; *Griffin v. Griffin,* 327 U.S. 220 at 231.

Manifestly, no "state grounds" can create jurisdiction where none exists by reason of failure to serve *in any manner* the person whose rights the court purports to affect by its ruling. *Armstrong v. Manzo,* 380 U.S. 545 at 550. It would appear that the State's assertion of adequate state grounds is merely a disingenous attempt to somehow force the instant case within the limits of this Court's Rule 16.

The lack of any adequate state grounds can be best seen from the record. No such grounds were urged below by the State, nor relied on by the state courts.[6] In opposing Appellants' Petition for Extraordinary Writ in the California District Court of Appeal, the State expressly argued that no personal jurisdiction over Appellants was necessary [R. 94], and joined issue squarely on whether or not the procedure herein satisfied due process requirements. [R. 97.]

Likewise, in opposing Appellants' Petition for Hearing in the California Supreme Court, the State addressed itself to the questions of due process requirements of notice and hearing. [R. 145.]

The State's assertion of "adequate non-federal basis" supposedly arising from the conclusion that the order of possession herein was not "effective" until service thereof, and was subject to a motion to vacate, bears a striking similarity to the argument pressed unsuccess-

[6]Failure of state courts to pass on the federal issue does not oust the U.S. Supreme Court of jurisdiction. *Lawrence v. State Tax Commission,* 286 U.S. 276 at 281-283.

fully upon this Court in *Griffin v. Griffin,* 327 U.S. 220. In the light of the comprehensive discussion and rejection of such argument in *Griffin,* 327 U.S. at 230-232 and in *Armstrong,* 380 U.S. at 551, Appellants refrain from arguing at length the lack of merit of the State's assertion.

In short, the State's claim of adequate state grounds is a belated, insubstantial attempt to conjure up some kind of basis for the decision below.

Conclusion.

A great problem of our era is the adjustment of the relationship between government and the governed. This brief deals with one important facet of that relationship. The noting of probable jurisdiction herein and the reversal of the decision below, will do more than merely provide Appellants with due process of law. Such action by this Court will settle the law on a constitutional question of widespread importance. Such action will also serve to inhibit the erosion of the rights of an individual at odds with the State.

A meaningful right to due process of law is particularly important where one of the litigants is the State, with all of its power and resources which are brought to bear upon the State's individual adversary. As this Court's decisions relating to due process rights of criminal defendants have made clear, an individual today needs judicial protection in his confrontations with the government. The due process guarantee of the Constitution is the fountainhead of that protection.

An eminent domain lawsuit is an awesome exercise of the State's naked power. It has been aptly said

that in terms of an individual being subordinated to governmental interest, eminent domain is second only in its impact to military conscription. It deprives a man of his home or business, it disrupts individual lives, plans and hopes, and is often a great hardship. Like the power of military conscription, it is justified upon the grounds that the good of the State requires it.

But unlike the power of military conscription, the exercise of eminent domain does not involve a fight for the nation's survival. A road widening does not usually involve a vital national interest.

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard." *Walker v. Hutchinson City,* 352 U.S. 112, 117.

And as in any other litigation, whether civil or criminal, the citizen is entitled as a matter of right to procedural due process.[7]

What "due process" means has been the subject of many judicial opinions and learned dissertations by writers. But one thing is certain, due process of law cannot, under any circumstances, in a judicial proceeding be reduced to a process wherein a court purports to sit and make orders substantially and permanently affecting a litigant's rights, without jurisdiction over that litigant, without notice that the court is about to act in that litigant's case, and without an opportunity to be

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[7]It should be noted that a defendant in an eminent domain action, unlike a defendant in most other actions, civil or criminal, is admittedly not guilty of any wrongdoing. Surely, such an innocent defendant should be entitled to as punctilious an observance of the fairness standards inherent in the concept of due process of law, as other defendants.

heard *before* the court takes such action. *Armstrong v. Manzo, supra.*

The State's suggestion herein, that a court may thus act *in absentia,* with the aggrieved person reduced to a motion to vacate the order as the sole means of protecting his rights, is a manifest violation of the most rudimentary notion of due process. The right to a hearing has little worth unless one is informed that proceedings against him have been instituted. *Schroeder v. City of New York,* 371 U.S. 208, 212.

The problem brought before this Court is a serious and troublesome one. It has been the subject of much litigation in many states. The result has been, that what constitutes due process of law when a state sets out to dispossess a property owner varies from state to state. Before possession may be taken of his land in an eminent domain proceeding, a citizen of Washington or Idaho is entitled by express judicial holding to notice and to a hearing before a court possessed of jurisdiction. The same rights accrue to a citizen of Illinois or Arizona by statute. But as California courts construe due process, a citizen of California is denied these rudiments.[8] And yet, they are all citizens of the United States, all entitled to the protection of the Fourteenth Amendment to the U.S. Constitution, which guarantees due process of law in like measure to all.

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[8]The anomaly of the present status of due process guarantees available to Californians is highlighted by the fact that the State may not order a man's telephone disconnected without *prior* notice and hearing (*Sokol v. Public Utilities Commission* (1966), 65 Cal. 2d ...., Advance Sheet citation: 65 A.C. 241). But, under the statute challenged herein, the State *can without notice or hearing* bulldoze a man's home into the ground on only three day's warning!

Appellants respectfully submit that the federal question presented herein is substantial and of ever-widening importance. Appellants respectfully urge this Court that it deny the State's Motion to Dismiss, and hear this appeal.

Respectfully submitted,

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